No. 427.

Brief of Hotchkiss for Appellee

Filed Nov. 26, 1897

Office Supreme Court, U. S.
FILED
NOV 26 1897
JAMES H. MCKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,

Appellant,

vs.

COLUMBIAN EQUIPMENT COMPANY,

Appellee.

No. 427.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief and Argument of John F. Martin and Henry D. Hotchkiss, Attorneys for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,

Appellant,

vs.

COLUMBIAN EQUIPMENT COMPANY,

Appellee.

No. 427.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief and Argument of John F. Martin and Henry D. Hotchkiss, Attorneys for Appellee.

IN THE

Supreme Court of the United States.

October Term, 1897.

HIGHLAND AVENUE & BELT RAILROAD COMPANY,

Appellant,

vs.

COLUMBIAN EQUIPMENT COMPANY,

Appellee.

No. 427.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief and Argument of John F. Martin and Henry D. Hotchkiss, Attorneys for Appellee.

Statement of Facts.

Appellee adopts the statement of facts presented by Appellant from the record, except that attorney for Appellant says on page 8, line 6, that—

"It is to be noticed, however, that the bill nowhere

charges that the complainant acted upon or was deceived by any of the representations of the Defendants."

This is not true. The bill, as amended, expressly states that but for the representations made by the respondent, the Complainant would not have entered into the contract, and that the representations made and on which Complainant relied were the special inducements to the contract, but Appellant's counsel, in making this stricture, travelled beyond the question certified to this Court.

Continuing the above quotation, where left off, on line 6—

"Nor that the Complainants accepted or availed itself of its option to purchase the properties of the Belt Railroad within the time prescribed in the agreement or since."

Another instance in which counsel departs from the question certified. The bill, as amended, alleges that the contract was ultra vires of the charters of each contracting corporation. Any attempt therefore on its part to have done so would have been absurd and unavailing, as neither could proceed any further.

Act to be Construed.

Section 7 of the Act of Congress approved March 3rd, 1891, as amended February 18th, 1895, is as follows, the original statute being omitted :—

"That where, upon a hearing in equity in a District Court or a Circuit Court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be

refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction, to the Circuit Court of Appeals: PROVIDED, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the Appellate Court; and the proceedings in other respects in the Court below shall not be stayed, unless otherwise ordered by that Court during the pendency of such appeal; and provided further, That the Court below may in its discretion require as a condition of the appeal an additional injunction bond."

Argument.

We are invited to a consideration of the statute touching appeals from interlocutory orders in injunction cases under the 7th Section of the Act as amended creating the Circuit Court of Appeals, by the certification to this Court by the Circuit Court of Appeals for the Fifth Circuit, of the question whether the order appointing Phillip Campbell receiver in this case is appealable under the above statute, on the ground that the order appointing him was the equivalent of an injunction or embraced within its terms an injunction.

There is no lack of pilots, but the currents of judicial thought have been so variable that the course of the law has not been clearly defined. In view of the difficulties

acknowledged by the learned Circuit Court of Appeals for the Fifth Circuit, as vexing the question, we can but hope to digest the authorities bearing upon the question certified in such order and method as that they may take light one from another, though they may take none from us.

The question certified may be resolved:

1. Is an order appointing a receiver susceptible of an appeal by reason of the implied injunction necessarily contained in any such order.

2. Is the order in this particular case susceptible of an appeal, either by reason of the implied injunction contained therein, or by reason of the expression therein of what would otherwise have been implied.

Appellant's brief is a most potent *argumentum ab inconvenienti* of the affirmative of this resolution of the question certified.

Appellant's counsel has arranged his argument under three heads, in the first of which he proposes that "Acts extending the right of appeal should be liberally construed," in the second that "The Statute (this one allowing appeals in injunction cases under Section 7 of the act above referred to) has been uniformly held remedial, and the greatest liberality has been shown in its construction to advance the remedy," and in the third: "Where the order appointing the receiver is accompanied by an order requiring the surrender of property, and restraining interference with it, it has been held appealable."

Attorneys for Appellee go further than the Attorney for Appellant is inclined to go on page 38 of his brief, Proposition one, and say that if the order complained of be an injunction, such order is necessarily included in every

order appointing a receiver, from which order of appointment no appeal lies under the statutes.

Forgay vs. Conrad, 6 Howard, 201 ;
Grant vs. Insurance Co., 106 U. S., 429; 1 Sup. Ct., 414.
Construction Co. vs. Young, 8 C. C. A., 231.

It may be conceded that an order appointing a receiver is in some cases more far reaching in effect than an interlocutory order for an injunction.

The line of demarkation between a restraining order in fact, from which an appeal lies, and an order appointing a receiver, from which no right of appeal is given, must be drawn in this case.

Should the order in this case appointing Phillip Campbell receiver be held to embrace within itself by implication or otherwise, an injunction, then it must follow that an appeal under the statute will lie from every EFFECTUAL order appointing a receiver; and for that matter, from every interlocutory order the Circuit Court may make in any case.

The order appointing a receiver necessarily carries with it the right of the receiver, the Court's officer, to the possession of the property, for otherwise the order would be ineffectual; and to say that a Court, having ordered that a receiver be appointed over property, cannot in the same order require a delivery of possession to its officers, would be to emasculate its order of appointment.

His first proposition is too broad, and it must be qualified, that if the statute giving the appeal

creates a *new jurisdiction* it is to be strictly construed,

> Endlich on Interpretation of Statutes, Section 155.
> Pittman vs. Flint, 10th Pickering 506,

and in and by this statute a new court with entirely new powers and jurisdiction was created, and no case could more clearly demonstrate the necessity for a narrow and strict construction than the case at bar, else will appeals lie in cases in which appeals have never been allowed, and in cases which in terms are not mentioned in the statute; to-wit: upon writs of *ni exiat regno and orders appointing receivers*, though even by the rule of liberal construction contended for by appellant, appeals would not lie in cases where they are refused; though it is submitted that as great injury might result from the refusal to appoint one, as in appointing one, and the contention of appellant is therefore one sided. The mischief may lie as much in the discretion of the Judge in refusing to appoint a receiver, the words GRANTING and REFUSING being the words of the statute, and if this statute must be construed to suppress the mischief, it may be pertinently asked, which mischief? If the mortgagor is destroying the mortgagee's security, the mortgagee is acknowledgedly entitled to a receiver, and if the Judge refuses the prayer for one, the mortgagee is helpless and the mischief continues, unless this Court is expected to go to the length that a refusal to appoint a receiver is such a refusal to grant the injunction necessarily implied in the appointment of a receiver that an appeal will lie under the statute.

Liberality of construction must not lead to an absurdity. A liberal construction it is thus shown, may be liberal

on one side only, the other remaining quite narrow and deformed.

The liberality of construction for which appellant contends in his second proposition (and to which appellee accedes) is that upon appeal in cases coming *within the statute*, the consideration of the Appellate Court shall not be so narrow as that it shall confine itself to the mere question of the propriety of the injunction as in the patent cases cited by appellant, but shall go further, and if possible dispose of the whole matter putting an end to the injunction and the litigation, when the entire record is before Court and the question to be decided is not one of fact, as in the case at bar; that ex-parte proceedings when on motion and notice, are within the spirit of the statute, the same being "hearings in equity."

Dudley Jones vs. Munger etc., Mfg. Co,, 1 C. C. A., 158.
Richmond vs. Atwood, 2 C. C. A., 596.
Smith vs. Vulcan Iron Works, 165 U. S. 518.

Certainly the widest liberality of construction has been given to the statute in the cases cited without going to the absurd, one sided length for which appellant contends. In fact a more liberal statute in terms is sometimes narrowed when the liberality of spirit of the statute nevertheless leads to an absurdity; as, if a statute enact that a man may try ALL cases arising within his manor, it has been held not to apply to cases wherein he is a party.

8th Reporter 118.

In respect to his third proposition on page 36 of his

brief he says: "Where the order appointing the Receiver is accompanied by an order requiring the surrender of property, or restraining interference with it, it has been held appealable," and he cites cases which we will take up in the order in which he discusses them.

Andrews vs. National Foundry & Pipe Works, 10 C. C. A. 60. In this case the Court in the decision on the rehearing says: "*The wrong done them was in ordering them to surrender to the receiver the possession of the water works plant of which they were in possession claiming title under the foreclosure sale, in directing the receiver to take possession thereof, and in enjoining them from asserting title or claim to the property.*"

This was an order to a party over whose property the receiver was not appointed to deliver property of which he had control as the owner thereof NOT AS AN OFFICER, AGENT OR SERVANT OF THE OCONTO WATER CO. there is no mere equivalent of the injunction implied in the order appointing the receiver, directed to the corporation, its servants, officers, agents and directors to deliver the property of the defendant as to whose property the receiver was appointed, to that receiver, but an order to a third party not only to deliver property, but EXPRESSLY RESTRAINING THEM AGAINST ASSERTING CLAIM OR TITLE TO THE PROPERTY. The same injunction as to the delivery of the property addressed to the corporation of whose property the receiver was appointed would have been merely formal, and not appealable.

The logic of this decision is rather that a mere formal

injunction in cases appointing receivers can not be tortured into an injunction which will support an appeal. Otherwise appeals would lie in all cases appointing receivers which is not within the terms of any statute allowing appeals from interlocutory orders.

The case of *Dudley E. Jones Co. vs. Munger etc. Mfg. Co.*, 1 C. C. A., 158, was a case wherein an injunction only was granted, there being in the case no suggestion of a receivership.

The same observation will apply to the case of *Richmond vs. Atwood*, 2 C. C. A., 596.

Appellant has cited authority to show that an order of the Court made, staying proceedings in a cause until further orders of the Court is an injunction within the meaning of the statute allowing appeals in injunction cases. *Pennsylvania Co. vs Jacksonville T. & K. Ry. Co.*, 5 C. C. A., 53; but was this order in that case A MERE INCIDENT TO THE ORDER APPOINTING THE RECEIVER, or was it in any manner whatsoever NECESSARILY IMPLIED IN THE ORDER APPOINTING THE RECEIVER? Not in anywise, the citation is foreign to the question certified. The order in that case was entirely distinct from the order appointing the receiver, in no manner a part of or incident to the order appointing the receiver.

Bissell Company vs. Goshen, 19 *C. C. A.* 25, is a case not involving in any manner the appointment of a receiver, whereas the case at bar must be confined to injunctions necessarily implied, or if expressed going no further than the implied injunction included in an order appointing a receiver. This case throws no light on the question under consideration.

Lake Street Railroad vs. Farmers Loan & Trust Co., 23 *C. C. A.* 448, falls within the observations made to the case last above cited, except in passing to note that in this case the Court says that an injunction is granted ONLY ON A PRAYER THEREFOR, and it is to be noted in the case at bar, that the order was granted upon a petition WHICH DID NOT PRAY AN INJUNCTION AT ALL—p. 21 of the Record paragraph 3, which reads as follows: "Wherefore petitioner prays that a receiver may be appointed forthwith to take charge of such properties under a decree of your honor's Court."

Lake National Bank vs. Wolfeborough Sav. Bank, 24 *C. C. A.* 195, is a case wherein a receiver was appointed, and in the order the defendants, its officers and agents were ordered to deliver the property held by them into the hands of the receiver, but the order did not stop with this but went further and ABSOLUTELY ENJOINED THEM [in terms] TO REFRAIN FROM INTERFERING WITH THE PROPERTY—and this express injunction was held

to be a substantial part of the decree. The Court in this case under consideration referred to an earlier decision of its own, *Potter vs. Beal*, 2 *C. C. A.*, *p* 60, in which it said: "*But it may be doubted whether we can be given jurisdiction by an injunction entered under color for that purpose, or by one purely nominal, concurrent with proceedings before a master, or the appointment of a receiver, on the impounding of papers or moneys pending litigation, if as effectual without the injunction as with it,*" and remarked in the Lake Nat. Bank case that the ruling therein was not in conflict with its decision in the case of Potter vs. Beal, and it will be noted that in the case of Lake National Bank vs Wolfeborough Saving Bank, the order went further than a purely nominal injunction, concurrent with the appointment of a receiver, and formally ENJOINED THE DEFENDANTS, ITS OFFICERS AND AGENTS TO REFRAIN FROM INTERFERING WITH THE PROPERTY.

It is but too clear that this is likewise the view of the attorney for appellant, for on page 42 of his brief at the bottom he asks: that because the order does not say in terms THAT IT IS AN INJUNCTION, or does not IN TERMS RESTRAIN DEFENDANTS, that it may have all, and even more force than an injunction [so nominated in the order, and restraining in terms] so far as it may effect the defendants injuriously, if the defendant is to be deprived of his appeal. Clearly the necessity for an injunction so nominated in the order, and restraining in terms is appellant's own view of the case, and is in accord with the honorable Circuit Court of Appeals for the First Circuit in the two cases above arrayed.

The case of *Smith vs. Vulcan Iron Works*, 165 *U. S.*, 518, is as foreign to the question under consideration as Newton's *Bionomial Theorem*, and the discussion of the case as immaterial as the striking of the town clock, for in that case there was no suggestion of a receivership, but an injunction coming within the statute, was prayed for and granted, and all that the Court decided was that under such circumstances the equity of the bill would be considered on appeal.

In the case of the *Florida Construction Co. vs. Young*, 8 *C. C. A.*, 231, the court inferentially holds that the formal order restraining the defendant, its officers, agents, etc., from interfering is not more than is necessarily included in the order appointing the receiver, from which no appeal is given. *In that case there was a restraining order in fact; in the case at bar there is not such an order.*

Appellant lays great stress upon the injury done in cases of receiverships, and seeks to justify a tortuous interpretation of the statute allowing appeals in cases of injunctions so that appeals may be extended to cases of receiverships through the alleged injunctions inherent in the orders appointing receivers, but it should not lie in the mouth of any one to impute wrong or injury through the custody of his property *by the court.*

In receiverships the whole business is not stopped as in injunctions, but under the direction and control of the court, through an impartial officer who is the representative of all parties concerned, the business is continued and the property conserved. An injunction against the further

operation of a railroad or a plant might do great harm, but the appointment of an impartial officer of the court to continue the operation of affairs, it is submitted, cannot be impugned without, at the same time, making serious imputations against the honesty and judgment of the court.

On the 6th day of March, 1897, appellee filed its petition for the appointment of a Receiver of the Highland Avenue & Belt Railroad Company, which petition is found on pages 19-21 of the Transcript.

The prayer of this petition (page 21) was that a Receiver should be appointed to take charge of the properties of the appellant. No injunction was asked for, but the appellant contends that that portion of the order of the Honorable John Bruce, Judge, appointing Phillip Campbell, Receiver, on April 5, 1897, (see pages 21-23 of the Transcript) in words as follows, to-wit: "And the said Highland Avenue & Belt Railroad Company and each and every of its officers, directors, agents and employes, are hereby required and commanded forthwith to turn over and deliver to such Receiver or his duly constituted representative, any notes, accounts, money or other property in his or their hands or under his or their control," is a "*mandatory*" injunction from which an appeal will lie under Section Seven as amended, of the Act of Congress creating the Circuit Court of Appeals.

This is not an order for an injunction, not even, as claimed, a *mandatory* injunction. The order and its effect must be construed by the petition and application then before the Court. The petition did not pray for an injunction,

nor was one necessary to the relief prayed for. (Page 21, Transcript.)

The remark of the learned Judge in granting the appeal (Judge Boarman) that the appointment of a Receiver implied an injunction, if its effect was to take property from the possession of one party and deliver it to another, might possibly be true if that was the effect, but it is insisted that the appointment of a Receiver takes the possession of the property *to the Court*, whose servant the Receiver is, and does not deliver it *to another party*; and that possession is still as much the possession of the *respondent* as of the *complainant*, and is for the conservation of the property for the benefit of all concerned.

High on Receivers, Section 134 and 739.

To say that an order appointing a Receiver carries with it an order for an injunction, is only true in the same sense as it may be that such order carries with it an order for a writ of possession or a proceeding for contempt. An injunction, mandatory or otherwise, is not the method by which a Court of Equity secures to itself the control of property or the possession thereof. If the parties refuse to recognize the right of the Receiver to have possession, the Court proceeds through its marshal to take it. Should the marshal be interfered with, the remedy is a proceeding for contempt.

The learned Judge, in making the order appealed from, seems to have followed the very form laid down in Daniel and in Curtis for use in cases where a Receiver is appointed and no injunction issued. If this order is appealable from,

then it follows that every *effectual order appointing a Receiver* is appealable from, and the Court of Appeals is exercising appellate jurisdiction in cases over which Congress has not given jurisdiction. However liberal the construction this Court may give to the said Section Seven, it certainly will not legislate to the Circuit Court of Appeals' jurisdiction. If such is to be its construction of this section, by permitting that Court to entertain this appeal, it will find itself embarrassed by appeals from interlocutory orders, which, by the act, are given preference to the prejudice of substantial appeals on the merits.

This not a mandatory injunction any more than would be an order by the Court upon a party to the record to bring into the Court files abstracted or papers wrongfully withheld, or an order overruling a demurrer whereupon the demurrant is required to plead over or answer.

The cases mentioned in the text books illustrative of a mandatory injunction are where title has passed by final decree from defendant to complainant, and the former refuses to deliver possession; in which case, the Court issues its mandatory writ to take possession from the defendant and deliver to complainant.

The text books and reports will be searched in vain for such a thing as a mandatory injunction as a preliminary writ or as a mode of enforcing an order given to a receiver to take possession of property. It has been decided by one of the best Circuit Judges, the predecessor of Judge Pardee, Judge W. B. Woods, in *McCauley vs. Kellogg*, *reported in 2d Wood*, 13, that a mandatory injunction would be granted *only on final hearing and then only to execute the decree.*

The fact is no injunction has been granted, mandatory

or otherwise. The portion of the order sought to be construed as a mandatory injunction is in reality only a *writ of possession.* The Court will aid its receiver in obtaining possession of the property subject to the receivership.

Beach on Receivers, Alderson's Edition, Section 224, says: "*Accordingly where the defendant over whose property a receiver is appointed, is in possession of real property as his own, the Court will, a proper application being made, grant an order directing him to deliver possession of it to the receiver: and this is the only proper course to pursue.*"

See also

High on Receivers, Section 144.
Griffith vs. Griffith, 2 Ves., 400.
Green vs. Green, 2 Sim., 430.

Conclusion.

Appellant's propositions are too broad. His first proposition is:

"Every order appointing a receiver which, like this, involves the taking of property from a party, necessarily implies, and is the equivalent of an injunction." The decision cited by him, *Andrews vs. National Foundry & Pipe Works, supra,* will clearly demonstrate the too great breadth of his first proposition. That was a case which INVOLVED THE TAKING OF PROPERTY FROM A PARTY, and it was properly held not to be a mere equivalent of an injunction or an implied one, but a veritable injunction, for, though it INVOLVED THE TAKING OF

PROPERTY FROM A PARTY, it took the wrong property from the wrong party.

Correctly stated his proposition would be: "Every order appointing a receiver which, like this, involves the taking of (THE) property (the subject matter of the receivership) from (the) party (defendant over whose property the receiver is appointed, being in possession thereof) necessarily implies, and is the equivalent of an injunction."

If even this more restrictive proposition, which comes more nearly within the circumstances of the case at bar be sound, and if mere implication and equivalence will satisfy the statute allowing appeals in injunction cases; then every order appointing a receiver of property in the possession of the defendant of which property the receiver is appointed, will support an appeal, even though there is no statute allowing appeals from orders appointing receivers; nevertheless, as the injunction would be implied an appeal would lie on the ground of the implied and included injunction.

His second proposition, that: "An order, in connection with an order appointing a receiver, which requires the defendant to deliver property in his possession to the receiver, is an injunction" is stated too broadly, even if the property to be delivered is the subject matter of the suit and identical with that over which the receiver is appointed, the order is no injunction, otherwise if it takes jurisdiction over property not that of the defendant, as in *Andrews vs. National Foundry & Pipe Works, supra.* In that case the Receivership was of the property &c., of the Oconto Water Company, and Andrews was enjoined to deliver property in his pos-

session to the receiver of the Oconto Co., this was properly enough held to be an injunction clearly within the terms of the statute on appeals in such cases, but that portion of the same mandatory order which was addressed or directed to the Oconto Company was held to be not within the terms of the statute; the PROPOSITION is too broad.

But this were *verborum minutiis rerum frangit pondera.* The question certified is, "Was the decree appointing Campbell receiver above referred to, susceptible of being appealed from on the ground that said order embraced within its terms an injunction or the necessary equivalent of an injunction"? and Appellees propositions are:

First. A mere implied injunction will not satisfy the statute.

Second. If the express injunction goes no further than the injunction necessarily implied, it is of no greater dignity than the implied injunction and will not satisfy the statute.

Third. The express direction in this case to deliver certain properties is of no greater dignity than the order appointing the receiver of the same property, and as the implied will not support the appeal, the express will not.

Fourth. This Court will not hold that from every interlocutory order the Circuit Court may make, or refuse to make, an appeal will lie to the Circuit Court of Appeals.

Fifth. That the Circuit Court of Appeals cannot entertain an appeal from an order REFUSING TO APPOINT A RECEIVER, for, if such were the case, it would give rise to an indefinite extension of the statute,

resulting in endless strife and litigation. The words GRANTING or REFUSING, being the words of the statute, an appeal must lie from the order refusing to appoint, equally as from the order appointing.

May we not in conclusion propound the very pertinent inquiry: If the order appointing Phillip Campbell receiver in this case be such an order as that an appeal lies from it under section 7, what form of order can a Circuit Judge make appointing, or refusing to appoint a receiver as that no appeal will lie therefrom?

The question certified by the Honorable Circuit Court of Appeals for the Fifth Circuit must be answered in the negative in both aspects.

Respectfully submitted,

JNO. F. MARTIN and
HENRY D. HOTCHKISS,
Attorneys for Appellee.